No. 87-20

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

HAMID R. KASHANI, *Petitioner,*

v

PURDUE UNIVERSITY, *et al., Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

June 8, 1987

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QUESTIONS PRESENTED

I. Whether a state statute which attempts to extend Eleventh Amendment immunity to political subdivisions is bindings upon federal courts?

II. Whether a state university is entitled to Eleventh Amendment immunity, where the state supreme court has held that state universities are "private or at most quasi public corporations" and that their property does not belong to State, where the university annually generates about $230,000,000 (2/3 of its budget) from non-state sources, and where the state law allows the university, as a political subdivision, to particiapte in the Political Subdivisions Risk Management program for the purpose of paying judgments, including liability for violations of federal civil rights?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Hamid R. Kashani, and Purdue University; the Trus- tees of Purdue University; S.C. Beering, as President; S. Arnott, individually and as the Vice President for Research and Graduate Dean; R.J. Shwartz, as Head of the School of Electrical Engineering; C.L. Coates, individually; G.R. Cooper, individually, as the Graduate Coordinator, and as a member of the Graduate Committee; A.L. Shelley, individually, as the Executive Assistant to the Head, and as a member of the Graduate Committee; Robert F. Pierret, individually and as Chairman of the Graduate Committee; P.C. Krause, individually, as Chairman of the Ph. D. Review Committee, and as a member of the Graduate Committee; C.D. McGillem and R.L. Gunshor, both individually, as members of the Ph. D. Review Committe, and as members of the Graduate Committee. Complaint 1 & 3-5, as modified, Order [of District Court] 1 (Aug. 3, 1983). Monetary claims against individual defendants in their individual capacities are dismissed by stipulation. See p. 33a, infra.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner Hamid R. Kashani respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 813 F.2d 843. It is reprinted in the Appendix, p. 1a, infra. The judgment of the Court of Appeals is reprinted at 11a.

The opinions and the judgment of the United States District Court for the Northern District of

Indiana have not been reported. They are reprinted at 12a, 19a, & 33a.

JURISDICTION

The District Court's judgment, dismissing Kashani's complaint was entered on June 28, 1985. The Notice of Appeal to the Court of Appeals was timely filed on July 29, 1985, July 28, 1985 being a Sunday. Fed. R. App. P. 4(a). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

The judgment and opinion of the Court of Appeals was entered on March 10, 1987. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The Eleventh Amendment and 42 U.S.C. § 1983 are relevant to the determination of this case. The text of these authorities, as well as the text of selected Indiana statutes, are set out in the Appendix, p. 1b, infra.

STATEMENT OF THE CASE

"Kashani, an Iranian, was terminated from the doctoral program in electrical engineering at Purdue University in Indiana during the 'Hostage Crisis.'" Kashani v. Purdue Univ., 813 F.2d 843, 844 (7th Cir. 1987). Kashani brought a § 1983 action, alleging national-origin discrimination; he sought both reinstatement and damages. Id. The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 & 1343. Complaint ¶ I-1 & -2, at 2.

The District Court held that Purdue University (Purdue) is a state agency entitled to Eleventh Amendment immunity and dismissed Kashani's claims for damages against Purdue and the individual defendants in their official capacities. 813 F.2d at 844. Subsequently, the District Court held that reinstatement of Kashani to the doctoral program would constitute retroactive equitable relief which is barred by the Eleventh Amendment, and it dismissed Kashani's claim for reinstatement. Id. To enable appeal, the parties stipulated to dismiss the remainder of Kashani's claims,

i.e. money damages against individual defendants in their individual capacities. Id.

The Court of Appeals affirmed in part, reversed in part, and remanded. It held that Purdue is a state agency entitled to Eleventh Amendment immunity. Id. Further, it held that "the Eleventh Amendment does not bar suit against the officials for the injunctive relief of reinstatement into the doctoral program." Id.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit's holding that Purdue University is entitled to Eleventh Amendment immunity confilicts with the prior decisions of this Court.

A. In holding Purdue immune, the Seventh Circuit erred in relying on a state statute purporting to retain Eleventh Amendment immunity for political subdivisions and state agencies.

1. In Mt. Healthy City School Dist. Bd. of Edu. v. Doyle, 429 U.S. 274 (1977), Justice Rhenquist held that whether an entity is a state agency "depends, at least

in part, upon the nature of the entity created by the state law." Id. at 280. To this end, he consulted Ohio's "Court of Claims Act," to determine how the local school board was defined under Ohio law. "Under Ohio law the 'State' does not include 'political subdivisions,' and 'political subdivisions' do include local school districts." Id. at 280 (citing Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975)).

2. The Ohio's "Court of Claims Act" deals with the immunity of various governmental entities in Ohio. Indiana's counterpart of the Ohio Act is the "Indiana Tort Claims Act." Ind. Code Ann. §§ 34-4-16.5-1 et seq. (West 1983 & Supp. 1986). Under this act, "State" does not include "political subdivisions," id. at 34-4-16.5-2(6) & (7), and "political subdivisions" include state universities and colleges. Id. at § 34-4-16.5-2(5)(VII).

3. The state statute dealing with immunity of governmental entities is the proper statute for determining the nature of an entity for Eleventh Amendment purposes, because it is the statute that a state court would apply if an action were brought to

it. The Indiana Tort Claims Act makes several fundamental distinctions between political subdivisions and state agencies, among others: A claim against a state agency must be presented to the agency and the Attorney General, id. at § 34-4-16.5-6, whereas a claim against a political subdivision must be presented to its local governing body. Id. at 34-4-16.5-8. Only the Governor can settle or compromise claims asserted against a state agency, id. at § 34-4-16.5-13, whereas the local governing body settles claims against a political subdivision. Id. at § 34-4-16.5-15. Further, section 34-4-16.5-17 prescribes that the liability for a judgment falls directly upon the particular governmental entity, that is the State in case of a state agency and the local governing body in the case of a political subdivision.

4. The Seventh Circuit recognized that under the Indiana Tort Claims Act, Purdue is a "political subdivision." 813 F.2d at 847. Nevertheless, it rejected this definition. In doing so, the Seventh Circuit relied on a state statute which purports to preserve Eleventh Amendment immunity for all governmental entities

within the State. Id. But a political subdivision has no Eleventh Amendment immunity in the first place—notwithstanding that the legislature has purported to be retaining or waiving it. A similar situation arose in Mt. Healthy, where the district court found that Ohio had waived the School Board's immunity. "We prefer to address instead the question of whether [the School Board] had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver." 429 U.S. at 280.

5. Eventually, the Seventh Circuit relied on Indiana's "Budget Agency Law," to hold Purdue a state agency. 813 F.2d at 847. But the definition of "state agency" under this law is so broad that it even includes "all non-governmental organizations receiving financial support or assistance from the state of Indiana." Ind. Code Ann. § 4-12-1-2(d) (emphasis added). The fact that state universities, along with private organizations, are designated as a state agencies under this law is only incidental to the fact that they receives financial support from the State. Nevertheless,

that Purdue receives financial support from the State is not dispositive of the immunity issue. Mt. Healthy, 429 U.S. at 280.

6. Finally, in Indiana, state universities are excluded from the meaning of "state agency" in every act dealing with the state government. Ind. Code Ann. §§ 4-13-1-1(b) (Administration Act of 1961), 4-13-2-1(b) (Financial Reorganization Act of 1947), 4-1-6-1(d) (Fair Information Practices Act), 4-3-6-2(1) (Reorganization Act of 1967), 4-13.5-1-1 (State Office Bldg. Comm'n.), 4-15-1.8-1 (State Personnel Dept.), & 4-22-2-3 (Administrative Rules and Regulations), § 4-22-1-2 (Adminstrative Adjudication Act) (West 1981 & Supp. 1985).

B. The Seventh Circuit's holding which grants immunity to an entity whenever a state examines and investigates the entity's request for funding, ignores this Court's decision in Mt. Healthy, that an entity can be amenable even though it receives significant funding from the State.

1. In Mt. Healthy, this Court found that the school board "receives a significant amount of money from the State." 429 U.S. at 280 (emphasis added). Yet,

Justice Rhenquist held that the school board was a "political subdivision" for Eleventh Amendment purposes. "Purdue receives approximately one-third of its income directly from the state." 813 F.2d at 845.

The state support for Purdue is far less than the support afforded to other political subdivisions that clearly have no claim to immunity. Indiana school boards receive 51.2 % of their $2,217,541,000. budget from the State. U.S. Dep't of Commerece, Bureau of Census, Finances of Pub. School Sys. in 1983-84 4-5 & 8 (1985) [App. 3c]. On a wider scale, local school boards across the United States, similar to the Mt. Healthy School Board, operate at a total budget of $133,449,502,000., and 45.4 % of their budget comes directly from their respective states. Id. By contrast, state universities operate at a total budget of $13,234,510,000., with only 40.84 % of their budget coming directly from the respective states. National Center for Edu. Statistics, Financial Statistics of Inst. of Higher Learning - Fiscal Yr. 1978 14-132 (1980) [App. 4c].

2. To seek financial support from the State, state

universities must submit a request to the Indiana Budget Agency. The Budget Agency, acting on behalf of the legislature, examines and investigates these requests and relays its findings and recommendations to the legislature. Ind. Code Ann. §§ 4-12-1-6 to -8. The Seventh Circuit also held that "state exercises further supervision of Purdue's finances through the Commission for Higher Education." 813 F.2d at 846. The Indiana law is to the contrary: "The commission shall have no powers or authority relating to the management, operation or financing" of state universities. Ind. Code Ann. § 20-12-0.5-11 (Burns 1975 & Supp. 1985).

3. This Court has held that an entity can be a political subdivision, even though it receives significant funding from the State. No state in the Union will ever provide significant funding to any entity without a mechanism to verify the legitimacy of that entity's financial needs. The effect of the Seventh Circuit's holding is that whenever the State examines and investigates an entity's request for funding, then the entity becomes clothed with immunity. Such an

expansive holding emasculates the effect of this Court's decision in Mt. Healthy.

C. The Seventh Circuit erred in holding that a judgment against Purdue must be paid from State funds, where under the precedents of this Court and Indiana Supreme Court, Indiana has no control over the property belonging to state universities, and where Indiana disclaims debts owed by corporations such as Purdue.

1. Trustees of Purdue University have extensive power "[t]o prescribe fees, tuition, and charges, necessary or convenient to the furthering of the purpose of the instiution and to collect the same." Ind. Code Ann. § 20-12-1-2 (Burns 1975 & Supp. 1985). In the academic year 1982-83, Purdue collected $59,000,000. in fees; $84,000,000. from sales, organized activities, gifts, grants, contract, and services; $64,000,000. from auxiliary enterprises; and $380,000. from endowment funds. In short, excluding state support, in the academic year 1982-83, Purdue generated an appoximate revenue of 233,600,000. [App. 1c & 2c]. Purdue can buy or sell property in its own name. Ind. Code Ann. § 20-12-1-2(a), (f), & 20-12-1.5-3,

or even own land. 813 F.2d at 847. Purdue's properties are not those of the State. Trustees of Vincennes Univ. v. State of Indiana, 55 U.S. (14 How.) 268 (1852) (State cannot dispose of land belonging to the University); Sendak v. Trustees of Indiana Univ., 254 Ind. 390, 396, 260 N.E.2d 601, 604 (1970) (State cannot control funds belonging to the University). In fact, the State must reimburse Purdue for the benefits it receives from the University. "[T]he state highway department is legally obligated to pay for right of way required across lands owned by trustees of Purdue University, whether such right of way is acquired by voluntary conveyance from the trustees or by condemnation proceedings authorized [by law]." 1969 Opinion of Ind. Atty. Gen. 219, 221.

2. Purdue can compromise, settle, or defend suits brought against it. Id. at § 34-4-16.5-15. It is also empowered to appropriate funds for payment of a judgment rendered against it. Id. at § 34-4-16.5-16 & -18. Further, Purdue can "pay any judgment, compromise, or settlement of [a] claim or suit" incurred as a result of its employees' "violation of the civil rights law of the United States." Id. at §

34-4-16.7-1. A judgment against Purdue will not be paid out of the state treasury. Purdue's funds are not those of the "state treasury." Ind. Code Ann. § 4-8-1-1(1)-(8) (defining 8 categories of funds comprising the state treasury). Thus, a judgment against Purdue will not affect the state treasury, because the State can not even "assume the debts of any county, city, town, or township, nor of any corporation whatsoever." Ind. Const. art. X, § 6. Purdue is a corporation. Ind. Code Ann. § 20-12-36-4; State ex rel. Robinson v. Carr, 111 Ind. 335, 338, 12 N.E. 318, 320 (1887).

3. Further, Indiana has provided its political subdivisions with an elaborate scheme of collective insurace to pay judgments. Under the Indiana Political Subdivisions Risk Management Act, Ind. Code Ann. §§ 27-1-29-1 to -16 (West Supp. 1985), all political subdivisions contribute to the Risk Management Fund, and when need arises draw from it to pay judgments. Purdue is defined a political subdivision under this Act. Id. at § 27-1-29-4.

4. The Seventh Circuit recognized that "[i]f a judgment were awarded against Purdue, the state

treasury will not write out a check to Kashani." 813 F.2d at 846. Nonetheless, it held Purdue immune, because it found that an award to Kashani may have an indirect effect on the state. That an indirect effect of a judgment may increase the amount of state support to an entity does not control an Eleventh Amendment inquiry. Edelman v. Jordan, 415 U.S. 651 (1974), teaches that the Eleventh Amendment bars monetary awards only when "[t]he funds to satisfy the award . . . must inevitably come from the general revenues of the state." Id. at 665 (emphasis added).

5. In holding Purdue a state agency, the Seventh Circuit emphasized the fact that "Purdue has no power to levy taxes." 813 F.2d 846. The Indiana Supreme Court has already held that an Indiana state university is a "private, or, at most, quasi public corporation." 111 Ind. at 338, 12 N.E. at 320. It would be absurd for the Indiana legislature to grant the power of taxation to a corporation which is "private, or, at most quasi public." The Seventh Circuit further held that "the absence of the power to tax is a strong indication that an entity is more like an arm of the state." 813 F.2d at

846. If this was true, then every private company incorporated and regulated to some degree by state laws would suddenly become an arm of a state.

6. The Seventh Circuit also emphasized the fact that Indiana exempts Purdue from state taxation. See Ind. Code Ann. §§ 6-2.1-3-24 & -3-2-3.1 (West 1982). The court of appeals viewed the exemption "indictive that an entity is an arm of the state rather than a subdivision." 813 F.2d at 846. The Seventh Circuit's conclusion is diametrically against the prior decisions of this Court. The revenues of a municipality, "'are not subject to taxation.'" Ashton v. Cameron Community Dist., 298 U.S. 513, 530 (1936) (quoting United States v. Railroad Co., 84 (17 Wall.) 322, 329 (1872)). That an entity is not an arm of the State is best demonstrated by the fact that the State has passed a statute to exempt it from taxation. If an entity was a part of the State, it would not have needed an exemption from taxation, because there would not have been an occasion to tax it in the first place.

D. The Seventh Circuit erred in holding Purdue

a state agency, after it found that Purdue trustees have extensive powers over local matters while Indiana legislature retains powers of a more superior nature, because under this Court's precedent, the findings of the Seventh Circuit could only yield to the conclusion that Purdue is more like a local government than a state agency.

1. The Seventh Circuit recognized that Purdue has broad powers over local matters. 813 F.2d at 847. Nonetheless, in holding Purdue a state agency, the court of appeals found it important that these broad powers are given to Purdue for "its primary purpose of education" and that "the legislature expressly retained the power to amend or repeal the duties and powers of the Trustees." 813 F.2d at 847. But, the fact that an entity is established for the "primary purpose of education" does not entitle it to immunity. The School Board in Mt. Healthy certainly was created for no other purpose but education. Further, the Seventh Circuit's reasoning incorrectly presumed that local governments have an inherent right to perpetual existence.

"A municipal corporation like the city of Baltimore is a representative not only

> of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It [the State] may enlarge or contract its [the City's] powers or destroy its existence."

Ashton, 298 U.S. at 513 (quoting Railroad Co., 84 (17 Wall.) at 329).

2. In Lake County Estates, Inc. v. Tahoe Regional Planning Agency (TRPA), 440 U.S. 391 (1979), Justice Stevens stated: "The regulation of land use is traditionally a function performed by local governments." 440 U.S. at 402. Likewise, Purdue's has enormous power over local lands. It is empowered "to acquire, erect, construct, reconstruct, improve, rehabilitate, remodel, repair, complete, extend, enlarge, equip, furnish and operate any and all buildings, structures, improvements or facilities, together with any and all utilities and other services and appurtenances related thereto." Ind. Code Ann. § 20-12-6-1 (Burns 1975 & Supp. 1985).

Purdue is also empowered to make facilities "for the production and transmission of heat, light, water and power;" it can also construct "sweage disposal facilities, street and walks, and parking facilities." Id. Further, Purdue can "appoint police officers" and "prescribe their duties and direct their conduct." Ind. Code Ann. § 2012-3.5-1(1)-(4) (Burns 1975 & Supp. 1985). Police officers so appointed "have general police powers." Id. at § 20-12-3.5-2(a). Further, Purdue is given the power of eminent domain and land condemnation. Id. at §§ 20-12-6-1 to -9, -7-1 to -7-11, & -8-1 to -8-11.

3. The status of Purdue, a political subdivision, must be compared to that of the Commission for Higher Education, a state agency. Whereas the Commission exercises its limited authority on a state-wide scale over all state universities, the authority of Purdue is limited to its own locale. Purdue is but one of many corporations operating a university within Indiana. See Mt. Healthy, 429 U.S. at 280 ("[Mt. Healthy] is but one of many school boards within the State of Ohio."). The Seventh Circuit's reasoning that "Purdue educates

students from all parts of the state," 813 F.2d at 847-48, ignores the fact that to receive education, a student must relocate to a locale operated by Purdue.

4. The Seventh Circuit also found it very significant that the majority of the Purdue trustees are selected by the Governor. 813 F.2d at 847. But the Indiana Supreme Court has held that the trustees of an Indiana state university "are not officers of the government, or subject to the control of the legislature in the management of [the university's] affairs." Robinson, 111 Ind. at 337, 12 N.E. at 320.

The fact that the Governor appoints Purdue trustees does not make Purdue a part of the State. TRPA, 440 U.S. at 401 (4 of the 10 members of the TRPA's governing board were appointed by the states); Book v. State Office Bldg. Comm'n, 238 Ind. 120, 136, 149 N.E.2d 273, 282 (1958) (the State Office Building Commission, organized as a corporation similar to Purdue, "is a separate corporate body created as an instrumentality of the State for a public purpose, but it cannot be considered as the State of Indiana in its complete sovereign capacity," even though its

governing body consists of the Governor, Lieutenant Governor, State Budget Director, State Treasurer, Commissioner of the State Department of Administration, State Auditor, and seven persons selected and appointed by the Governor).

5. The trustees of state universities are not subject to state control. In TRPA, Justice Stevens observed: "Indeed, that TRPA is not in fact an arm of the State subject to its control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." Id. at 402. Similarly, the State of Indiana on numereous occasions has resorted to state and federal courts to impose its will upon the state universities. See e.g., Vincennes Univ. v. State of Indiana, 55 U.S. (14 How.) 268 (1852); State v. Rankin, 260 Ind. 228, 294 N.E.2d 604 (1973) (Indiana State University); Indiana Attorney General Sendak v. Trustees of Indiana Univ., 254 Ind. 390, 260 N.E.2d 601 (1970); State v. Rankin, 160 Ind. App. 103, 313 N.E.2d 705 (1974), transfer denied (1975); Sendak v. Trustees of Purdue Univ., 151 Ind. App. 372, 279 N.E. 840

(1972). The Seventh Circuit, in holding Purdue immune, did not consider the very factor that this Court has characterized as "most forceful."

II.

The decisions of Courts of Appeals holding state universities entitled to Eleventh Amendment immunity rest on contradictory grounds. This area of law is in need of clarification and guidance by this Court.

There are state universities which have been held not entitled to Eleventh Amendment immunity. See e.g. Hopkins v. Clemson Agricultural College of S. Carolina, 221 U.S. 636 (1911); Soni v. Board of Trustees of Univ. of Tennessee, 513 F.2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976) (finding a waiver, without deciding the university's eligibility for immunity); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975) (holding the University amenable, after finding that damages will be paid from a segregated account); Dyson v. Lavery, 417 F. Supp. 103 (E.D. Va. 1976) (Virginia Polytechnic Institute); Gordenstein v. University of Delaware, 381 F. Supp. 718 (D. Del. 1974); Samuel v.

University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974), app. dismissed, 506 F.2d 355 (3d Cir. 1974), rev'd on other grounds, 538 F.2d 991 (1976) (Pennsylvania State University, University of Pittsburgh, and Temple University). There are also several cases which hold state universities entitled to immunity. However, in holding the universities immune, the Courts of Appeals often rely on contradictory grounds. The problem is further complicated by the universities which change their position depending on the desirability of prospective outcome. Some universities in one case argue that they are no part of the state or the state government; still in another case they argue that they are alter egoes of the state and thus entitled to immunity. The irony of the situation is that often they prevail in both cases. As will be shown within the limited space of this petition, this area of federal law is in state of chaos and in need of clarification and guidance by this Court.

(A)

In deciding whether a university is a state agency, the Courts of Appeals have examined state law. However, there is no cohesion among the Court of Appeals as to what type of statutes they should consult for this purpose. In different cases, the Courts of Appeals have considered different statutes which were enacted for divergent purposes. Kashani, 813 F.2d at 847 (Indiana Budget Agency Law, an act giving the Budget Agency, an arm of the legislature, to examine requests for funding made to the legislature); Harden v. Adams, 760 F.2d 1158, 1163-64 (11th Cir. 1985), cert. denied, 106 S. Ct. 530 (1985) (Ala. Code § 16-56-1 & -3, statutes creating the University as a body corporate); Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 303 (6th Cir. 1984), cert. denied, 469 U.S. 1113 (1985) (Ohio Court of Claims Act, an act defining the extent of immunity of governmental entities); Cannon v. University of Health Sciences/The Chicago Medical School, 710 F.2d 351, 356 (7th Cir. 1983) (Illinois Purchasing Act, Ill. Rev. Stat. ch. 127, § 132.3a (1977), an act regulating competitive bidding and procurement practices); United Carolina Bank v.

Board of Regents, 665 F.2d 553, 557 (5th Cir. 1982) (consulting Tex. Rev. Civ. Stat. Ann. art. 8309h, an act allowing "workmen's compensation insurance for employees of political subdivisions"); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F.2d 599, 601 (10th Cir. 1966) (Colo. Rev. Stat. § 124-5-1, an act defining the Trustees a "body corporate" empowered to hold property and "be party to all suits and contracts, . . ., in like manner as municipal corporatins of this state").

The Courts of Appeals have also uniformly held that significant state support to a state university cloth it with Eleventh Amendment immunity. Kashani, 813 F.2d at 845 (state provides one-third of Purdue's revenues); Harden, 760 F.2d at 1164; Hall, 742 F.2d at 304 (University received an average of 36 % of its support from the State); Jagnandan v. Giles, 538 F.2d 1166, 1175 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977) (Mississippi State University could request upto 72 % of its budget from the State). At the same time, the Courts of Appeals have consistently held that extensive state support to and regulation of

universities could not even be a basis for a finding of state action. Musso v. Suriano, 586 F.2d 59 (7th Cir. 1978) (Loyola University); Lamb v. Rantoul, 561 F.2d 409 (1st Cir. 1977); Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Sparks v. Catholic Univ. of America, 510 F.2d 1277 (D.C. Cir. 1975); Wahba v. University of New York, 492 F.2d 96 (2d Cir. 1974), cert. denied, 419 U.S. 874 (1974).

Several circuits have held that an exemption from state taxation is an important indicia that an entity is entitled to Eleventh Amendment immunity. Kashani, 813 F.2d at 846; Hall, 742 F.2d at 307; Blake v. Kline, 612 F.2d 718, 725 (3d Cir. 1979), cert. denied, 447 U.S. 921 (1980). But this factor does not distinguish between a state agency and a political subdivision. This Court has already decided that the revenues of a political subdivision are not subject to taxation. Ashton, 298 U.S. at 530.

Some circuits have held that an ability to assess local property tax is a significant factor in showing that an entity is a political subdivision. Kashani, 813

F.2d at 846; Hall, 742 F.2d at 304; United Carolina Bank, 665 F.2d at 558. The problem with this reasoning is that most universities already own all the land within their jurisdiction. The universities, however, enjoy a greater ability, than do the cities, to raise their own funds. For example, Purdue can assess and collect fees. It can also sell services and engage in auxiliray enterprises— the types of activity that cities and counties generally cannot enjoy. In 1982-83, Purdue generted 233,600,000. on its own (including 11 million dollars in federal support). [App. 1c & 2c]. The Tippicanoe county, within which Purdue is located, and who has no claim to immunity, typically generates only 9,735,000. on its own (including federal support). [App. 5c]. Thus, as long as the universities have their enormous resources of their own to satisfy a judgment, they should not be able to trigger the Eleventh Amendment. "The fact that the General Assembly may feel morally obligated to replenish the funds in time of emergency is of no consequence. Such a possible ancillary effect on the state's general treasury is simply too attenuated to bring the Eleventh Amendment

into play." Bowen v. Hackett, 387 F. Supp. 1212, 1221 (D.R.I. 1975). See also Hall, 742 F.2d at 310-11 (Merritt, J., dissenting); Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), cert. denied, 107 S. Ct. 71 (1986) (Posner, J.) (rejecting the proposition that state idemnification statute can serve as a basis for granting absolute immunity to official wrongdoers).

Further, even those political subdivisions which can impose property taxes, cannot do so without the State's approval— and then only within strict conditions. "Considring its current legal and contractual obligations, and the limitations on the use of its available funds under Indiana law, the Lake County defendants have no legal authority to acquire the funds necessary to comply with the judgment order without the approval of the State Tax Board." Jensen v. State Bd. of Tax Comm'rs, 763 F.2d 272, 281 (7th Cir. 1985).

(B)

To gain control over university affairs, in many

states the executive branch and the university officials have resorted to courts. See generally P. Hollander, Legal Handbook for Educators 16-18 (1978). These actions are generally commenced in state courts. To avoid the reach of the executive branch, universities most often claim that they are not a part of the state and that they are independent entities not subject to state control. However, when the state universities are hailed to the federal courts to answer for their alleged unconstitutional conduct, their most-exercised defense is the Eleventh Amendment.

For example, in People ex rel. Bd. of Trustees of Univ. of Illinois v. Barrett, 382 Ill. 321, 347, 46 N.E.2d 951, 964 (1943), Illinois Attorney General Barrett claimed that the University is a state agency and that only the Attorney General can control its legal affairs. The University persuaded the Illinois Supreme Court that "the University of Illinois is not an agency or instrumentality of the State. It is a separate corporate entity, which functions as a public corporation." Id. at 347, 46 N.E.2d at 964. The court further held that the University "has and can exercise no sovereign powers.

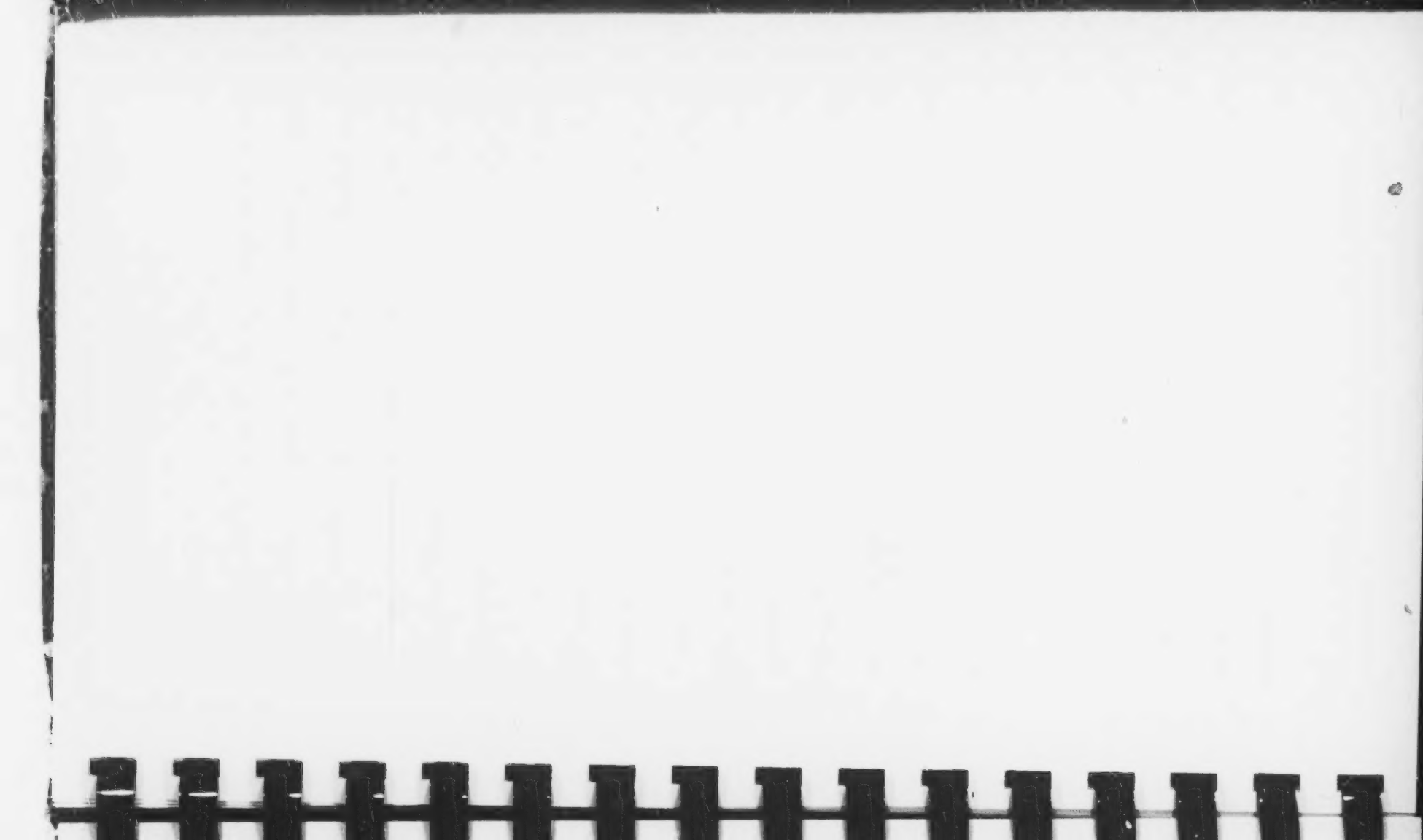
It is no part of the State or State government." Id. at 343, 46 N.E.2d at 962. Yet, in Cannon, the University of Illinois vigorously and successfully argued that it is a state agency entitled to Eleventh Amendment immunity. 710 F.2d at 351.

In Sendak v. Trustees of Indiana Univ., 254 Ind. at 396, 260 N.E.2d at 604, the University successfully argued that it is no part of the State and that its privately obtained funds do not belong to the State. A few years later, a New York plaintiff sued the University on an alleged contract to purchase art works. University moved to dismiss, claiming that it is a part of the State of Indiana entitled to the Eleventh Amendment immunity. Again, it prevailed. Establissement Pour La Diffusion et La Connaissance des Oeuvres D'Art v. The Trustees of Indiana University, No. 76 Civ. 1477(JMC) (S.D.N.Y. Feb. 17, 1978) (available June 7, 1987, on LEXIS, Genfed library, Dist file).

There also has been some instances of abuse. Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), rev'd, 477 F.2d 1 (3d Cir. 1973), on

remand, 392 F. Supp. 118 (1975), aff'd, 552 F.2d 948 (1976) (en banc), was a sex discrimination action. Originally, the District Court dismissed the case. The Court of Appeals vacated and remanded. On remand, University stipulated that it is not a state agency of the State. 392 F. Supp. at 123. It then opted to prove that the University's actions does not even amount to "state action." As Braden was pending in the District Court, in Samuel, the University of Pittsburgh was claiming that it is a part of the State entitled to Eleventh Amendment immunity. Finally, the University was caught red-handed: Samuel was pending before another judge of the same district court with the same counsel advancing both contradictory arguments. The University lost on both issues.

The same strategy was also pursued by Temple University, in early 1970's. In Samuel, pending in the Western District of Pennsylvania, Temple argued that it is a state agency and thus immune. In another case, in Eastern District of Pennsylvania, it claimed that its relation with the State is so remote that its actions do not even amount to "state action." This brought Temple



a sharp admonishment from Judge Higginbotham:

> [F]or more than a decade Temple has attempted to walk nimbly on both sides of the line demarcating "state action" from "nonstate action." At any time its ultimate rationale seems solely dependent upon whether it is more profitable for Temple to adopt the "state action" or "nonstate action" mantle. When seeking an increased largesse from the state's treasury, the predominant pitch was that Temple should get more because it a state related institution, and with such salesmanship (or should we call it "statesmanship"), Temple has received more than 270 million dollars in direct appropriations or benefits over the last nine years. When confronted with the possibility of a vigorous federal enforcement of the National Labor Relations Act against Temple, once again Temple emphasized its state-related status as the basis of exemption from enforcement of the federal statutes. Though it succeeded in these instances by flying the flag of state-relatedness, Temple's position dramatically shifts in this forum where it is faced with a federal civil rights statute which is applicable to all institutions which function under color of [state law]. Temple's prior stated-related voices have become muted; they now croon a counter lullaby that "after all, Temple is merely a private institution," and thus not subject to the "state action" prohibitions of the federal civil rights statutes.
>
> . . . Temple['s] adroit and nimble legal maneuvering has finally caught up with it. It must now either fish or cut bait.

Isaac v. Board of Trustees of Temple Univ., 385 F.

Supp. 473, 474-75 (E.D. Pa. 1974).

Yet most notable is the case of Texas A & M University. In 1980, the Fifth Circuit, without reaching the Eleventh Amendment issue, held that there are no analytical differences between the University and cities. Gay Student Srvcs. v. Texas A & M Univ., 612 F.2d 160, 164 (5th Cir. 1980). But four years later the court found that the University is immune under the Eleventh Amendment. Gay Student Srvcs. v. Texas A & M Univ., 737 F.2d 1317, 1333 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985).

(C)

The Courts of Appeals have recognized that "[e]ach state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstance." Soni, 513 F.2d at 352; Kashani, 813 F.2d at 845; Jagnandan, 538 F.2d at 1181. Incredibly, however, no Court of Appeal has yet squarely found a state university amenable. The problem is the compunding of lower court precedents,

albeit that they rest on contradictory grounds. This is a situation most suitable for this Court's attention.

In the recent history, this Court has not ruled on the status of state universities under the Eleventh Amendment. It should do so, in order to provide the lower courts with clarification and guidance in this confused area of law.

III.

This case presents the important question that whether a state university is entitled to Eleventh Amendment immunity, where the state supreme court has held that state universities are "private, or, at most, quasi public" corporations and that their property does not belong to State.

In State ex rel. Robinson, the Indiana Supreme Court concluded that an Indiana state university is "technically private, or, at most, quasi public corporation" Id. at 338, 12 N.E. at 320.

The trustees of Purdue University are not officers of State government. "Since the trustees of Purdue University are by legislative enactment created a body

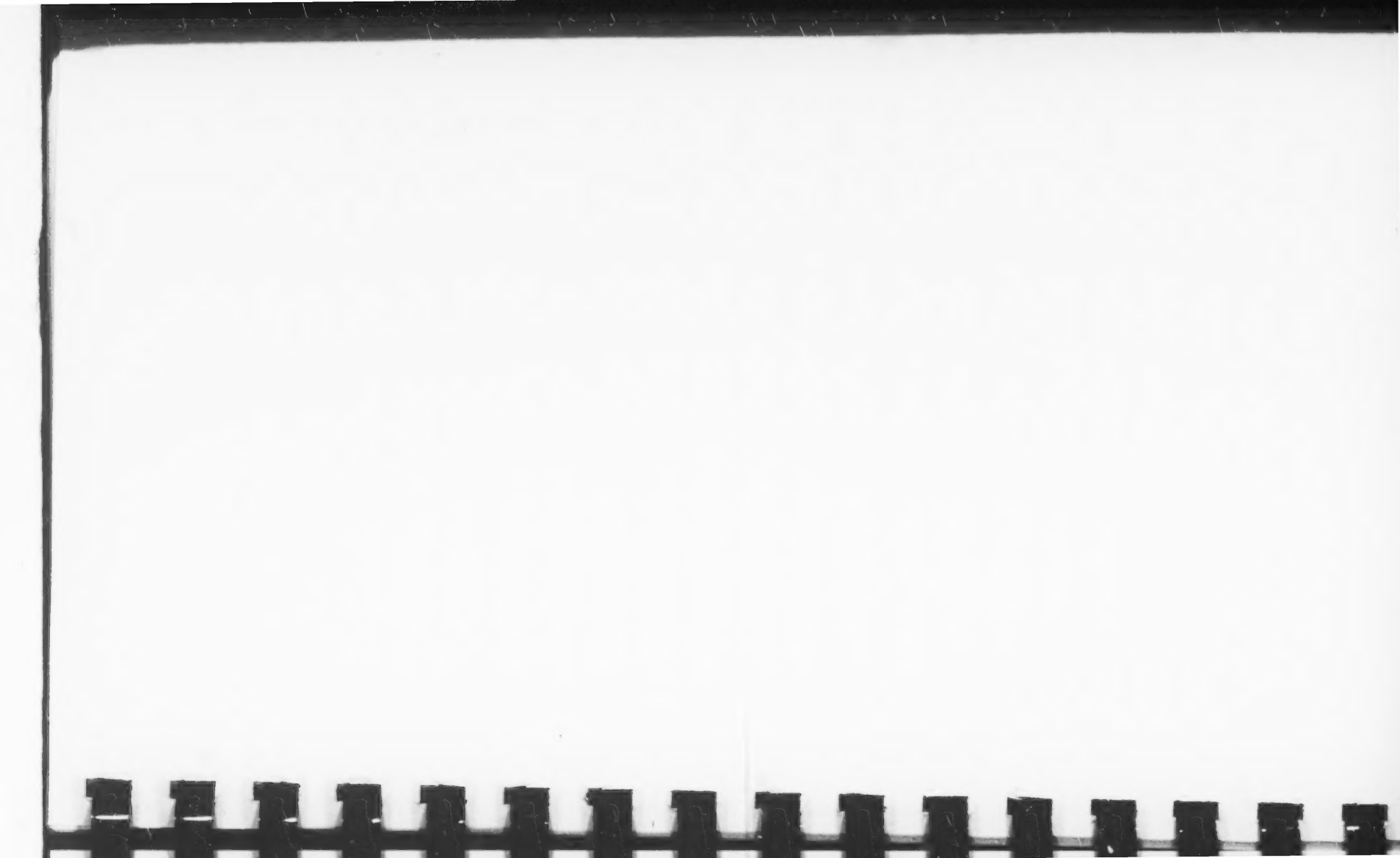
corporate they constitute a distinct and separate legal entity and cannot be classed as either officers, employees or servants of any department of state." 1937 Opinion of Ind. Atty. Gen. 517, 519. Their power over the University is similar to the power of a city council over the municipality. "Regulations adopted by persons in charge of a school [Trustees of Purdue University] are analogous to by-laws enacted by municipal and other corporations." State ex rel. Stallard v. White [, President, Purdue University], 82 Ind. 278, 286 (1882). In a strict sense, Purdue University is not a municipality. 111 Ind. at 337, 12 N.E. at 320. "The term 'municipality' in its strict sense is usually considered as meaning the political subdivision of the state. . . . However, it may also be used in a broader sense to include public or political corporations which are not strictly municipalities." 1948 Opinion of Ind. Atty. Gen. 423, 424 (discussing the status of Purdue University).

Trustees of Purdue University have extensive powers to generate their own revenue. [1c & 2c]. And the State cannot control the University's property. See

pp. 11-12, supra. Even though, the State through the Commission for Higher Education exercises some supervisory powers over Purdue, the Indiana law clearly prescribes: "The commission shall have no powers or authority relating to the management, operation or financing" of state universities. Ind. Code An. § 20-12-0.5-11 (Burns 1975 & Supp. 1985).

Under these circumstances and the precedents of this Court, the Seventh Circuit erred in holding Purdue a "state agency" entitled to Eleventh Amendment immunity. "But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the State alone by virtue of its sovereignty." Hopkins, 221 U.S. at 645 (1911); Mt. Healthy, 429 U.S. at 280 (holding local school boards, a form of public corporations, not entitled to Eleventh Amendment immunity).

Under the guidelines established by the Seventh Circuit, any university which is chartered by a state, receives some financial support from it, and is subject to some supervisory regulations by the State will become clothed with immunity. Notably, for many years



litigants have had significant difficulty to establish that the conduct of such universities amount to "state action." The facts and law show that, today, universities resemble the common political subdivision of municipalities. Indeed, numerous universities, both public and private, assume such a dominate role in their local communities that they are viewed as educational analogues of the commercial company towns. See Clague, Suing the Univ. "Black Box" Under the Civil Rights Act of 1871, 62 Iowa L. Rev. 337, 347-54 (1976). With the continuing advent of science, universities play a more dominant role in the life of America. It is important that this Court grants plenary review of this issue, in order to determine the perimeters of the immunity of these institutions.

CONCLUSION

For the foregoing reasons, Petitioner Hamid R. Kashani respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

June 8, 1987

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2306

HAMID R. KASHANI,

Plaintiff-Appellant,

v.

PURDUE UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Indiana.
No. L 83-24—**Allen Sharp**, *Chief Judge.*

ARGUED SEPTEMBER 23, 1986—DECIDED MARCH 10, 1987

Before BAUER, *Chief Judge*, WOOD, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Hamid R. Kashani sued Purdue University and various of its officials under 42 U.S.C. § 1983, alleging that he was terminated from a doctoral program at Purdue University on the basis of national origin. The trial court held his claims both for damages and for reinstatement barred by the Eleventh Amendment. In this appeal we uphold the conclusion that Purdue University shares in the sovereign immunity of the State of Indiana under the Eleventh Amendment. We hold further, however, that the Eleventh Amendment does not bar suit against the officials for the injunctive relief of reinstatement into the doctoral program.

I

Hamid R. Kashani, an Iranian, was terminated from the doctoral program in electrical engineering at Purdue University in Indiana during the "Hostage Crisis." He filed a section 1983 action, alleging discrimination on the basis of national origin contrary to the Equal Protection Clause. The suit named as defendants Purdue University; the trustees and president of the university, in their official capacities; various graduate school officials and members of the Ph.D. Review committee, in both their official and individual capacities. Kashani sought both monetary damages and reinstatement from all defendants, except for the claims against the officials in their individual capacities, which sought only monetary damages.

The district court dismissed for lack of subject matter jurisdiction the claims for monetary relief against the University and against the various officials in their official capacity on the basis that Purdue was entitled to the protection of the Eleventh Amendment. The court subsequently dismissed all claims for injunctive relief, on the basis of the Eleventh Amendment. To enable appeal, the parties stipulated to dismissal of the remaining claims for monetary relief against officials in their individual capacities. Kashani does not appeal these stipulated dismissals. Kashani thus appeals only the claims against the university and against its officials in their official capacity. Against both, Kashani seeks monetary and injunctive relief. For the reasons stated below, we hold that Purdue is an arm of the state entitled to the protection of the Eleventh Amendment. We thus affirm the dismissal of all claims against the university and all claims against the officials for monetary relief. We hold, however, that the injunctive relief of reinstatement is not barred by the Eleventh Amendment and thus reverse the dismissal of the claims for injunctive relief against the officials in their official capacity.

II

The jurisdictional bar of the Eleventh Amendment protects the state and its agencies; it does not shield political subdivisions. The question here, then, is whether Purdue "is more like a county or city than it is like an arm of the State." *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 573 (1977) (local school board not entitled to immunity). The question of sovereign immunity for a state university is not unexplored territory. The vast majority of cases considering the issue have found state universities to be forfended by the Eleventh Amendment. *E.g., Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985); *Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (Southern Illinois University and University of Illinois); *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) (San Francisco State College); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 558 (5th Cir. 1982) (Stephen F. Austin State University); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981) (University of Arizona); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978) (University of Puerto Rico); *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971). In fact, the parties' briefs and our own research have failed to reveal a single circuit court opinion holding a state university not entitled to Eleventh Amendment immunity. There are district court opinions to the contrary. *E.g., Samuel v. University of Pittsburgh*, 375 F. Supp. 1119 (W.D. Pa. 1974), *rev'd on other grounds* 538 F.2d 991 (3rd Cir. 1976).

Although state universities have consistently been found to be entitled to immunity, courts reexamine the issue with regard to the facts of each case "because the states have adopted different schemes, both intra and interstate, in constituting their institutions of higher learning." *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 557 (5th Cir. 1982). However, given the great number of cases holding state universities to be instrumentalities of the state for Eleventh Amendment purposes, it would be

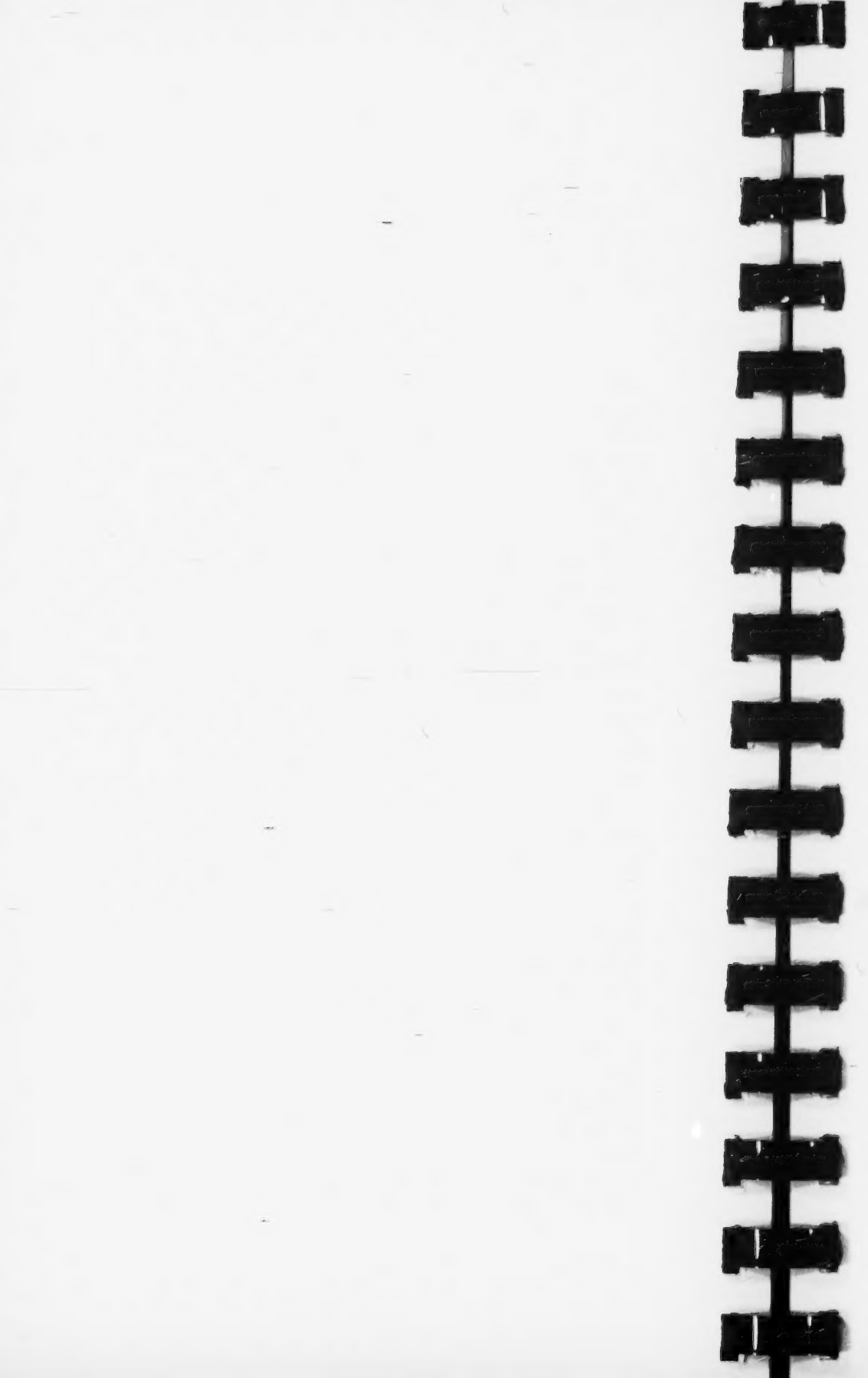
an unusual state university that would not receive immunity. The analyses in these cases support our holding that Purdue is an instrumentality of the State of Indiana, enjoying its sovereign immunity.

A

Courts have looked to a number of criteria in deciding this issue. The most important factor is the extent of the entity's financial autonomy from the state. "[A] crucial question in determining whether the suit should be regarded as one against the state is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981); *accord Cannon v. University of Health Sciences/The Chicago Medical School*, 710 F.2d 351, 357 (7th Cir. 1983). Courts consider the extent of state funding, the state's oversight and control of the university's fiscal affairs, the university's ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university.

Purdue receives approximately one third of its income directly from the state. For example, in the academic year 1982-83, the university received slightly over 36% of its income from state appropriations. Other sources, with approximate percentages, were auxiliary enterprises (17%); student fees (16%); gifts, grants, and contracts (13%); sales and services (7%); student aid (4%); federal appropriations (3%); organized activities (2%); endowment income (.1%).

Indiana examines Purdue's finances carefully in deciding on the amount of appropriations. Indiana's Budget Agency Act, Ind. Code §§ 4-12-1-1 *et seq.*, expressly includes Purdue in the definition of "state agency." The definition expressly excludes "cities, towns, townships, school cities, school towns, school townships, school districts, [and] other municipal corporations or political subdivisions of the state." As a "state agency," Purdue is required to pre-



pare and file a detailed statement of all expenditures it made in the last budgetary period or expects to find necessary in the next budgetary period. The statement must show reasons for all expenditures, "showing particularly the reason for any requested increase or decrease over former appropriations." The Budget Agency is empowered to require the submission of additional information and to hold hearings. The Budget Agency analyzes the statement and submits its recommendations to the legislature. Thus, Purdue would have to report the payment of a judgment to the legislature as part of its financial report. *Cf. Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985) ("Where the budget of an entity [Troy State University] is submitted to the state for approval, this suggests that the entity is an agency of the state."). The state exercises further supervision of Purdue's finances through the Commission for Higher Education, which is empowered under Ind. Code § 20-12-05-8 to review appropriation requests and make recommendations to the governor, budget agency, and legislature.

Purdue has no power to levy taxes. So although Purdue has sources of revenue other than appropriations from the legislature, it lacks the ability that cities and counties typically have to require payments in the form of taxation. It can raise money only by entering into one of various markets: the market for bonds, for higher education, for services, and so forth. Paying a judgment in a case like the present is also not one of the purposes for which Purdue is authorized to issue bonds. The absence of the power to tax is a strong indication that an entity is more like an arm of the state than like a county or city, because that enablement gives an entity an important kind of independence. The absence of that authority, for an entity like Purdue, ensures ultimate fiscal reliance upon the state. *Cf. Mackey v. Stanton*, 586 F.2d 1126, 1131 (7th Cir. 1978), *cert. denied*, 444 U.S. 882, 100 S. Ct. 172 (1979) ("More important, both have the power to raise their own funds by tax levy and by bond issuance."); *United Carolina Bank v. Board of Regents*, 665

F.2d 553, 558 (5th Cir. 1982) ("Most telling is the power of junior colleges to levy ad valorem taxes . . . . Under Texas law, political subdivisions are sometimes defined as entities authorized to levy taxes."); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985) ("[N]one of the state universities or colleges . . . have power to levy taxes to service such bond issues or otherwise provide revenue independent of state appropriations.").

Indiana has exempted Purdue from taxation, a relief that some courts find indicative that an entity is an arm of the state rather than a subdivision. Indiana, however, extends that relief also to political subdivisions, so the factor has less force in this case.

If a judgment were awarded against Purdue, the state treasury would not write out a check to Kashani. But in view of the fact that Purdue is by design dependent on state appropriations, which are evidently carefully geared through close oversight to meet the changing financial needs of the university, it is apparent that the payment would directly affect the state treasury. Indiana has not created an entity with a separate financial basis; it has created one that is dependent upon and functionally integrated with the state treasury. Our examination of the extent of Purdue's fiscal autonomy, then, strongly indicates that Purdue is entitled to Eleventh Amendment immunity.

B

In determining whether Purdue is independent of the state, we must consider, beside Indiana's financial constraints on the university, the general legal status of the university. "The answer depends, at least in part, upon the nature of the entity created by state law." *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 572 (1977).

The issue cannot be resolved by simple reference to Indiana statutory definitions. Indiana statutory law relating

to Purdue sometimes defines Purdue as a state agency, sometimes as a political subdivision. The Budget Agency Act, as noted above, expressly includes Purdue in the definition of "state agency," while expressly excluding from that definition municipalities, counties, and school districts. The Tort Claims statute, on the other hand, includes a "State college or university" in the definition of "Political subdivision" and excludes a "political subdivision" from the definition of "state agency." The Act, however, expressly provides "Nothing contained in this chapter shall be construed as a waiver of the eleventh amendment. . . ." Other statutory definitions and references point in both directions, depending on the particular statutory purpose and framework. We must look to substance rather than form.

Very significant in considering whether Purdue has sufficient autonomy from the State of Indiana to be considered more like a county or city than like an arm of the state is the fact that the majority of the members of Purdue's governing council, the Board of Trustees, are selected by the Governor of Indiana. Indiana Statutes Ann. 20-12-37-2 (Burns 1985). *Cf. United Carolina Bank v. Board of Regents*, 665 F.2d 553, 558 (5th Cir. 1982) ("Their governing bodies are elected by local voters rather than being appointed by the Governor with the advice and consent of the Senate."); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985) ("Troy State University is subject to substantial state control; its Board of Trustees . . . is composed in part of state officials and in part of gubernatorial appointees."). The Governor has the right to select seven of the ten Trustees; the Purdue Alumni Association selects the other three.[1] The Governor officially appoints all ten. The Trustees serve terms ranging from one to three years.

[1] Of the seven Trustees selected by the Governor, under Ind. Stat. 20-12-37-4, one must be a woman, two must be "men of prominence and character in agricultural pursuits; two [2] shall be men chiefly engaged in manufacturing industries; and two [2] shall be citizens of character and distinction; one [1] must be a full time student of Purdue."

The Board has the right to regulate the use of university property and the conduct of persons on that property, to set fees and tuition, to discipline students and faculty, to prescribe admission standards, to establish curricula, to set academic standards, and to award financial aid. Ind. Code § 20-12-1-2. It would seem that the delegation of such powers is necessary to enable the university to function. The Trustees are also authorized to enter into contracts; to sue, be sued, settle lawsuits, and pay judgments; to exercise eminent domain; to engage in construction projects and own land. The various powers granted are an indication of independence. But that is undercut by the fact that the majority of the members of the Board itself are selected by the chief executive officer of the state and serve for a maximum of three years. Thus the independence is circumscribed. Moreover, the legislature expressly retained the power to amend or repeal the duties and powers of the Trustees. Ind. Code § 20-12-36-6. From that perspective, the functions granted the board appear less like the independent powers of a city or county than like the authority delegated to an instrumentality of the state to spare the legislature the need to ratify its every action. Also these powers are granted the university only so that it is able to carry out its primary purpose of education, in contrast to a city or county, whose exercise of such powers, in far more extensive form, is its very raison d'etre.

The Court in *Mount Healthy* looked not just to whether the entity was formed with independent powers from the state but also to whether it served the state as a whole or only a region. *Mount Healthy School District v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568, 572 (1977) ("Petitioner is but one of many local school boards within the State of Ohio."); *See also Mackey v. Stanton*, 586 F.2d 1126, 1131 (7th Cir. 1978), *cert. denied*, 444 U.S. 882, 100 S. Ct. 172 (1979) (County departments of welfare "perform their duties on a local level."). Purdue educates students from all parts of the state. The local powers that it has are granted it to enable it to perform that function. Thus,

we conclude as did the district court that the Eleventh Amendment shields Purdue.

III

Although the Eleventh Amendment bars all claims against Purdue and the damages claims against its officials in their official capacities, it does not thwart the claims against the officials in their official capacities for the injunctive relief of reinstatement. Under the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), a suit for prospective injunctive relief is not deemed a suit against the state and thus is not barred by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S. Ct. 1347, 1356 (1974); *Quern v. Jordan*, 440 U.S. 332, 337, 99 S. Ct. 1139, 1143 (1979). We recently held that an injunction ordering reinstatement of a pharmacist "is clearly prospective in effect and thus falls outside the prohibitions of the Eleventh Amendment." *Elliot v. Hinds*, 786 F.2d 298, 302 (1986). The same result has been reached by the Sixth Circuit regarding reinstatement of a medical student, *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 307 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113, 105 S. Ct. 796 (1985), and by the Second Circuit regarding reinstatement of an employee to the payroll, *Dwyer v. Regan*, 777 F.2d 825, 836 (2nd Cir. 1985). We must thus remand for consideration of the reinstatement claim based on Kashani's allegation that the defendant officials intentionally discriminated against him on the basis of his national origin.

IV

For the foregoing reasons, the dismissal of Kashani's claims against Purdue University and the dismissal of the claims for damages against the defendant officials are AFFIRMED. The dismissal of the claims for injunctive relief against the officials in their official capacity is REVERSED and REMANDED for further proceedings consistent with this opinion.

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JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

HAMID R. KASHANI, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of
No. 85-2306 vs.	) Indiana, Lafayette Division.
PURDUE UNIVERSITY, et al., Defendants-Appellees.	) No. 83 C 24 Allen Sharp, Judge

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Lafayette Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, REVERSED IN PART, and the cause is REMANDED, in accordance with the opinion of this Court filed this date. Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI
Plaintiff

v.

No. L 83-24

PURDUE UNIVERSITY; TRUSTEES OF PURDUE UNIVERSITY; STEVEN BEERING, in his official capacity as Acting President of Purdue University; STRUTHER ARNOTT, individually and in his official capacity as Vice-President for Research and Graduate Dean of Purdue University; RICHARD SCHWARTZ, individually and in his official capacity as Head of the School of Electrical Engineering of Purdue University; GEORGE R. COOPER, individually and in his official capacity as Graduate Coordinator and member of Graduate Committee of the School of Electrical Engineering; AUSTIN L. SHELLEY, individually and in his official capacity as Executive Assistant to Head and member of Graduate Committee, School of Electrical Engineering; ROBERT F. PIERRETT, individually and in his official capacity as Chairman of Graduate Committee of School of Electrical Engineering; PAUL C. KRAUSE, individually and in his official capacity as Chairman of Ph. D. Review Committee and member of Graduate Committee of School of Electrical Engineering; CLAIRE D. MCGILLEM and ROBERT L. GUNSHOR, both individually and in their official capacities as members of Ph. D. Review Committee and members of the Graduate Committee of School of Electrical Engineering
Defendants

On October 9, 1984 this court entered an

extensive memorandum following its earlier decision in Wellman v. Trustees of Purdue University, 581 F. Supp. 1228 (N.D. Ind. 1984) and a decision in this court in Elliot v. Hines, 537 F. Supp. 571 (N.D. Ind. 1983). See also, this court's opinions, Hendrix v. State of Indiana, 581 F. Supp. 31 (N.D. Ind. 1984); Burr v. Duckworth, 547 F. Supp. 192 (N.D. Ind. 1982); Schott v. Helper, 101 F.R.D. 99 (N.D. Ind. 1984). Following that, on the 24th of December, 1984 further oral argument was had with reference to the possible application of Eleventh Amendment immunity to the claim for reinstatement of this plaintiff. That issue has also been extensively briefed. Recent authority has eroded the original hesitation of this court to apply the Eleventh Amendment to the request for equitable relief made by this plaintiff in this case. The first basis of that is found in the extensive discussion of Justice Powell, speaking for the majority of the court, in Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 104 S. Ct. 900 (1984). An extensive discussion in the same vein, more conceptually applicable to the facts of this case is found in Toledo, Peoria and W.R. Co. v.

State of Illinois, 744 F.2d 1296 (7th Cir. 1984). The long and short of it is that the injunctive relief here requested, i.e. reinstatement, is fundamentally no different than the kind of injunctive relief that was discussed by the Court of Appeals in the Toledo case. Perhaps the Fifth Circuit put it most succintly in the very recent decision of Chiz's Motel and Restaurant, Inc. v. Mississippi State Tax Commission, 750 F.2d 1305 (5th Cir. 1985). In that case following Pennhurst the court stated that Eleventh Amendment immunity jurisdiction applies to state agencies and officials acting in their official capacity regardless of the relief the plaintiff seeks and held further that the mandates of Ex Parte Young, 209 U.S. 123 (1908) serves only to permit a federal court to grant prospective injunctive relief and inhibits a federal court under the Eleventh Amendment from granting legal or equitable retroactive relief.

It is the task of this court here to now determine whether the relief is prospective or retroactive and it appears to be the former rather than the latter. In Larson v. Domestic and Foreign Commerce Corp., 337

U.S. 682, 687-88 (1949), the Supreme Court stated:

> The crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. In a suit against the officer to recover damages for the agent's personal actions that question is easily answered. The judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty. The question becomes difficult and the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific property or monies, ejectment from land, or injunction either directing or reinstating the defendant officer's actions. In each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself, may, through him, be restrained. As indicated, this question does not arise because of any distinction between law and equity. It arises whenever suit is brought against an officer of the sovereign in which the relief sought from him is not compensation for an alleged wrong but, rather, the prevention or discontinuance, in rem, of the wrong. In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the government, but because it is, in substance, a suit against the government over which the court, in the absence of consent, has no jurisdiction.

The narrow type of injunctive relief allowed under Ex Parte Young is fundamentally different from the

type sought by the plaintiff in this case. In Ex Parte Young the injunction could effectively issue directly against the individual state official as it was enough to order the Attorney General Young to personally cease his illegal conduct - the State itself was not implicated. Such cannot be said for the equitable relief sought by the plaintiff in this case. The only effective equitable relief would be an affirmative order enjoining the Trustees of Purdue University to reinstate the plaintiff as a graduate student. The Trustees of Purdue University as a part of the sovereignty of the State would be an indispensible party to such an order for it is only the Trustees who possess the power to effectuate the plaintiff's reinstatement. See I.C. 20-12-1-2 and 20-12-36-4. Thus the plaintiff's claim for equitable relief is virtually a suit against the State which is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974) is a manifestation of the narrowness of the Ex Parte Young's abridgement of sovereign immunity under the Eleventh Amendment. In this same vein see Haygood v. Southern, 117 U.S. 52 (1886). This court cannot escape the conclusion that

the equitable relief sought by this plaintiff in reality constitutes relief which is in fact against the sovereign. In order to reinstate the plaintiff as a graduate student the decree would have to operate against the Trustees of purdue University and such relief in the opinion of this court was precluded as early as 1887 in In Re Ayres, 123 U.S. 443, and as recently as 1984 by the Court of Appeals in Toledo and in 1985 by the Court of Appeals for the Fifth Circuit in Chiz. Thus, the claims for injunctive relief must be dismissed. The plaintiff's citation of O'Connor v. Board of Education of School District 23, 645 F.2d 578 (7th Cir. 1981), cert. denied, 454 U.S. 1084 (1981), on remand, 545 F. Supp. 376 (N.D. Ill. 1982) is misplaced since none of the defendants in that case were state officials or agencies subject to Eleventh Amendment immmunity. O'Connor is more in line with Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).

All claims for injunctive relief against all defendants are now dismissed. The remaining damage claims against the defendants in their individual

capacities will go forward and another pretrial conference thereon will be scheduled. The same is set for pre-trial conference on April 25, 1985 at 2:00 o'clock P.M. SO ORDERED

Enter March 22, 1985.

/s/ (Hon.) Allen Sharp

CHIEF JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI
Plaintiff

v.

No. L 83-24

PURDUE UNIVERSITY; TRUSTEES OF PURDUE UNIVERSITY; STEVEN BEERING, in his official capacity as Acting President of Purdue University; STRUTHER ARNOTT, individually and in his official capacity as Vice-President for Research and Graduate Dean of Purdue University; RICHARD SCHWARTZ, individually and in his official capacity as Head of the School of Electrical Engineering of Purdue University; GEORGE R. COOPER, individually and in his official capacity as Graduate Coordinator and member of Graduate Committee of the School of Electrical Engineering; AUSTIN L. SHELLEY, individually and in his official capacity as Executive Assistant to Head and member of Graduate Committee, School of Electrical Engineering; ROBERT F. PIERRETT, individually and in his official capacity as Chairman of Graduate Committee of School of Electrical Engineering; PAUL C. KRAUSE, individually and in his official capacity as Chairman of Ph. D. Review Committee and member of Graduate Committee of School of Electrical Engineering; CLAIRE D. MCGILLEM and ROBERT L. GUNSHOR, both individually and in their official capacities as members of Ph. D. Review Committee and members of the Graduate Committee of School of Electrical Engineering
Defendants

MEMORANDUM AND ORDER

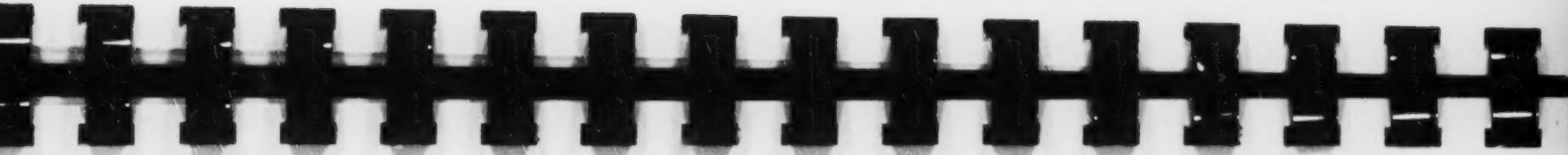
This case has been the subject of elaborate proceedings since it was filed on February 1983.

The court takes up only that part of the defendants' motion for summary judgment that deals with immunity of damage claims under the Eleventh Amendment of the Constitution of the United States.[1]

Plaintiff's federal claims against the Defendant rest exclusively upon certain alleged violations of his Fourteenth Amendment rights. The statutory mechanism by which Plaintiff seeks to enforce these claims is 42 U.S.C. 1983. The nub of Plaintiff's claim is that he was terminated as an electrical engineering doctoral candidate not for permissible academic reasons but rather, for the impermissible reason that his national origin is Iranian; and that the process within the Electrical Engineering School by which this termination was effectuated was itself "arbitrary and capricious." Plaintiff alleges that this conduct by the Defendant violated his right to due process of the laws, and his right to equal protection of the laws. To recover for these alleged violations, Plaintiff has sued Purdue

University. The Trustees of Purdue University, Steven C. Beering, the President of Purdue University, and various other individuals within the Graduate School and the School of Electrical Engineering.

Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), represents an Eleventh Amendment watershed. In that case, the Court held that state officials might be enjoined as individuals from enforcing a state law which violated the Fourteenth Amendment. The Court reasoned that an official who attempts to take such unlawful action comes into conflict with the superior authority of the Constitution, and is, therefore, "stripped of his official or representative character and . . . subjected in his person to the consequences of his individual conduct." Id. at 159-60, 52 L. Ed. at 728-29. The idea that the Court restrained the individual rather than the state was, of course, pure fiction, since the state could not act other than through its officials. However, through this fiction the Court created a narrow exception to the preclusive bar of the Eleventh Amendment, while at the same time leaving intact its primary impetus, viz., that federal



jurisdiction over suits against a state, absent consent, "was not contemplated by the Constitution when establishing the judicial power of the United States." Hans v. Louisiana, 134 U.S. 1, 15, 10 S. Ct. 504, 33 L. Ed. 842, 847 (1890); see also THE FEDERALIST, No. 81 (Lodge Ed. 1902); see generally JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

While the fiction of Ex parte Young might in theory have been employed to order state officials to pay damages the Court did not so extend it. In several suits brought against state officials to recover funds from the state treasury, the Court has found that the state was "the real, substantial party in interest" and held the actions barred by the Eleventh Amendment. Ford Motor Company v. Department of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389, 394 (1945); see also Kennecott Corporation v. State Tax Commission, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946); Great Northern Life Insurance Company v. Reed, 322 U.S. 47, 51, 54, 64 S. Ct. 873, 88 L. Ed. 1121, 1124, 1126 (1944).

The rule of Ex Parte Young does not generally extend to suits against the state or its agencies. Moreover, individual state agents are immune from those claims which amount to de facto claims for monetary (i.e. legal) relief against the state. For purposes of this case, current Eleventh Amendment deprives a federal court of subject matter jurisdiction over all claims against states, instrumentalities of states, and individual state agents, except for the power to impose equitable relief.

In the case of Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 662 (1974) the court delineated the parameters of the immunity of the Eleventh Amendment. The District Court in Edelman had ordered the defendants, state welfare officials, to process welfare applications in accordance with the schedule prescribed in federal regulations and to disburse benefits that had been withheld because of unlawful processing delays prior to the court's order. Id. at 656, 39 L. Ed. 2d at 669. The Supreme Court held that the District Court had exceeded its jurisdiction, as delimited by the Eleventh Amendment, in ordering the

payment of benefits wrongfully withheld, Id. at 668-669, L. Ed. 2d at 676. This retroactive portion of the District Court's order was barred because of its likeness to a "monetary award against the state itself." Id. at 665, 39 L. Ed. 2d at 674. The Court approved, however, the District Court's grant of prospective injunctive relief against the individual welfare officials. Id. at 664, 667-68, 39 L. Ed. 2d at 673, 675. The thrust of the holding in Edelman was stated thusly:

> We do not read Ex Parte Young or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in Ex Parte Young hewed to no such line.

Id. at 666, 39 L. Ed. 2d at 674-75.

The straightforward rule of Edelman is that an individual may not sue a state, an instrumentality of a state, or an individual state agent, in federal court, where the relief sought "is in practical effect indistinguishable . . . from an award of damages against the state and will to a virtual certainty be paid from

state funds, and not from the pockets of the individual state officials who were the defendants in the action." Id. at 668, 39 L. Ed. 2d 676. A demand upon the "state fisc" by a plaintiff ipso facto deprives a federal court of subject matter jurisdiction; as the Court in Edelman further stated,

> The relief awarded in Ex Parte Young was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirements of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that Court held should have been paid, but was not, stands on quite a different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman the named individual defendant. . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the state of Illinois, and thus the award resembles far more closely the monetary award against the state itself, Ford Motor Co. v. Department of Treasury, supra, than it does the prospective injunctive relief awarded in Ex Parte Young.

415 U.S. at 664-65, 39 L. Ed. 2d at 673-74

Corey v. White, 457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982) grew out of the fight between the

California State Controller and the Attorney General for the State of Texas over the right to assess taxes upon the Estate of Howard Hughes. After the Supreme Court declined to exercise its original jurisdiction, the administrator of the Estate instigated a federal interpleader action in a federal court in Texas; the above-mentioned state official were the named party defendants.

The Court of Appeals in Corey rejected the state's claim "That although the suit was nominally against state officials, it was in effect a suit against two sovereign states for equitable relief barred by the Eleventh Amendment." 457 U.S. at 88, 72 L. Ed. 2d at 698. In so holding, the Court of Appeals relied upon,

> A passage in the Edelman opinion quoted supra that it interpreted as limiting the bar of the Eleventh Amendment to suits "by private parties seeking to impose a liability which must be paid from public funds in the state treasury" . . . Because the interpleader plaintiff, the administrator of the estate, had sought only prospective relief, the appellate court held that the Eleventh Amendment did not bar his suit.

457 U.S. at 90, 72 L. Ed. at 669. The Court in Corey unequivocably rejected the argument that Edelman had

held that the bar of the Eleventh Amendment extended only to actions seeking de facto monetary relief against a state:

> We are unpersuaded by this view of Edelman. That case involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Edelman held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 89 L. Ed. 389, 65 S. Ct. 347 (1945), was authority for this result.
>
> Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State . . . ." Thus, the Eleventh Amendmenmt by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of

> the Amendment itself. Edelman did not embrace, much less imply, any such proposition.

457 U.S. at 90-91, 72 L.Ed.2d at 699 (emphasis added).

The holding in Corey v. White is consistent with the earlier per curiam opinion in Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978). In that case, inmates and former inmates of the Alabama prison system sued the state of Alabama and the Alabama Board of Corrections, (as well as a number of prison officials), alleging the conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Court limited itself to a consideration of "whether the mandatory injunction issued against the state of Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. 1983." Id. at 782, n.2, 57 L. Ed. 2d at 1116. In answering this query in affirmative, the court said:

> Among the claims raised here by petitioners is that the issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because

> the Eleventh Amendment prohinbits federal courts from entertaining suits by private parties against States and their agencies. The Court of Appeals did not address this contention, perhaps because it was of the view that in light of the numerous individual defendants in the case dismissal as to these two defendants would not affect the scope of the injunction. There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit.

438 U.S. at 781-82, 57 L. Ed. 2d at 1116.

The combined effect of Ex Parte Young, Edelman, and Corey is that (1) all suits for damages against a state or one of its instrumentalities are without the subject matter jurisdiction of the federal courts; (2) claims seeking monetary relief against individual state agents which, in reality, would ultimately be satisfied by the state or its instrumentality, are, likewise, barred; and, (3) the only avenue of recourse available to a plaintiff in federal court is the one accorded by Ex Parte Young, to-wit, an action against the individual state agents for equitable relief. These points were recently borne out in a decision in this circuit.

In Cannon v. University of Health Sciences/The

Chicago Medical School, 710 F.2d 351 (7th Cir. 1983), the plaintiff had been denied admission to five different medical schools, including, the University of Illinois and Southern Illinios University (both state universities); she subsequently brought actions of various sorts against these defendants, including a 1983 action against the last-mentioned state universities, and certain admissions officials of each. The District Court held that the Eleventh Amendment barred any damage claim against the state universities and that plaintiff's claim for equitable relief were subject to summary judgment on the ground of mootness. Id. at 355. On appeal to the Seventh Circuit, the plaintiff argued that the Eleventh Amendment was not a bar to her claim for damages because "Her claims were against individual representatives of the two schools as well as the schools themselves . . . and no judgment against the schools or their treasury . . . and finally even though Illinois and SIU are subject to control by the State, they are not the State of itself for purposes of the Eleventh Amendment." Id. at 356.

The Seventh Circuit upheld the district court's

dismissal (based on the Eleventh Amendment) of plaintiff's claims for damages against the state university and extended this bar to their respective admissions officials. The court began by noting that "SIU and Illinois are recognized as state agencies under Illinois law. Elliot v. University of Illinois, 365 Ill. 338, 6 N.E.2d 647 (1936); Ill. Rev. Stat. ch. 127, 132.3(a) (1977). The powers and duties of the boards of trustees are governed by chapter 144 of the Illinois Revised Statutes." Id. In other words, the court determined that the University of Illinois and SIU were both within the ambit of the Eleventh Amendment's immunity. (See Part I-C infra).

The Court in Cannon than proceeded to dispose of plaintiff's argument that the Eleventh Amendment did not preclude her 1983 claim because she had also sued individual admissions official of the two universities. The Court stated:

> The Eleventh Amendment is applicable even though Cannon has attempted to name individual representatives of the universities, as well as the institutions themselves, as defendants. Cannon's complaint refers only to "John Doe" and "Mary Roe." Even if discovery resulted in Cannon's

identifying the individuals and if amending the complaint was held to be consistent with rule 15(c)(2), FED. R. CIV. P. 15(c)(2), the Eleventh Amendment still bars the claims for damages.

In Edelman v. Jordan . . . the Court held that the Eleventh Amendment bars a suit "by private party seeking to impose a liability which must be paid from public funds in the state treasury." . . . Relying on Ford Motor Co. v. Department of Treasury . . ., the Edelman Court reasoned that if the damage award is to be paid by the state, the state is the real party in interest even though individual officials might be named as nominal defendants. . . . In this case, because the state universities are the alter ego of the State, any damage award chargeable to university assets is an award against the State itself. . . . If Cannon's suit would result in a damage award payable by the universities, it is barred by the Eleventh Amendment.

Cannon's allegations pertain to the enforcement, by university authorities, of university's policies that allegedly codoned discrimination on the basis of age with the resulting disparate impact on women. Recovery is sought from the institutions, not the individuals. As the Supreme Court observed in Edelman, it is a "virtual certainty that any damage award will be paid from the state funds, and not from the pockets of the individual state officials who were the defendants in the action." . . . The district judge correctly held, therefore, that Cannon could not recover damages from Illinois or SIU pursuant to her Section 1983 claims.

710 F.2d at 357 (emphasis added) (footnote omitted); see also Rasky v. Department of Registration and Education, 553 F. Supp. 627, 630, 631 (N.D. Ill. 1982) ("Edelman v. Jordan . . . held that the Eleventh

Amendment forbids suits against state officers for retrospective monetary relief. . . . Edelman equally supports dismissal of the 1983 damage claim against department's officials.") (emphasis in original).

By eliminating the plaintiff's claims for damages against both the state universities, and their respective admissions officials, the Seventh Circuit in Cannon proceeded to address the only remaining viable claim which the plaintiff could assert; namely, equitable relief against the individual admissions officials. The Court in that case clearly recognized the limited nature of Ex Parte Young's abrogation of the immunity accorded by the Eleventh Amendment.

The Eleventh Amendment bars plaintiff's claims for legal damage relief against the Trustees of Purdue University. This result is dictated by the Supreme Court decisions discussed above, and by the Seventh Circuit's decision in Cannon.

There can be no doubt that Purdue University is a state agency for purposes of the Eleventh Amendment. Such is the unavoidable result under Indiana law. See Russell v. Trustees of Purdue University, ___ Ind. ___,

163 N.E. 529, 531 (1929); Ind. Code Ann. 20-12-35-1, 20-12-36-4 (Burns). The powers and duties of the Board of Trustees of Purdue University are governed by Ind. Code Ann. 20-12-36-2, 20-12-1-1 et seq. (Burns). Accord Bailey v. Ohio State University, 487 F. Supp. 601 (S.D. Ohio 1980); Weisbord v. Michigan State University, 495 F. Supp. 1347 (W.D. Mich. 1980); Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971).

The reasoning and result found in the above authorities are followed in this court's decision in Wellman v. Trustees of Purdue University, 581 F. Supp. 1228 (N.D. Ind. 1984).

This court must now decide whether the above extends to damage claim against the university officials in their official capacity. In this regard Owen v. Lash, 682 F.2d 648 (7th Cir. 1982) must be followed.

All the claims for equitable relief remain for further proceedings. It is not here intended to rule on other issues dealing with the merits of this case. Discovery should now proceed and a further pretrial conference will be held.

Enter March 22, 1985.

/s/ (Hon.) Allen Sharp

CHIEF JUDGE, UNITED STATES DISTRICT COURT

FOOTNOTES

1. AMENDMENT XI - (Ratified February 7, 1795) - The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States of Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. The reasoning and result here is in the same vein as other cases from this court dealing with the Eleventh Amendment. See Schott v. Hepler, 101 F.R.D. (N.D. Ind. 1984) and the authorities collected in footnote 1 at page 102 thereof.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

HAMID R. KASHANI, Plaintiff,	)	
v.	)	Cause No. L83 0050
PURDUE UNIVERSITY, et al., Defendants.	)	

ORDER AND ENTRY OF JUDGMENT

Parties have jointly moved the Court to enter a final judgment dismissing, with prejudice, all monetary claims of Plaintiff against individual defendants in their individual capacities. Parties have done so with the understanding that the effect of this entry is to render the October 9, 1984 and March 22, 1985 Orders of this Court final and appealable.

The Court being duly advised in the premises, so Ordered this 28th day of June, 1985.

/s/ (Hon.) Allen Sharp

Chief Judge, United States District Court, Northern District of Indiana

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APPENDIX - B

U.S. Const. amend XI

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced, or prosecuted against one of the United States by citizens of another states, or by citizens or subjects of any foreign state.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CHAPTER 16.5

TORT CLAIMS AGAINST GOVERNMENTAL ENTITIES AND PUBLIC EMPLOYEES

34-4-16.5-2 Definitions

Sec. 2. As used in this chapter:

(1) "employee" and "public employee" means a person presently or formerly acting on behalf of a governmental entity whether temporarily or permanently or with or without compensation, including members of boards, committees, commissions, authorities and other instrumentalities of governmental entities, and elected public officials, but does not include an independent contractor or an agent or employee of an independent contractor;

(2) "governmental entity" means the state or a political subdivision of the state;

(3) "incompetent" means a person who is under the age of eighteen (18) years or is incapable by reason of insanity, mental illness, or other incapacity of either managing his property or caring for himself or both;

(4) "loss" means injury to or death of a person, or damage to property;

(5) "political subdivision" means a:

(i) county,

(ii) township,

(iii) city,

(iv) town,

(v) separate municipal corporation,

(vi) special taxing district,

(vii) state college or university,

(viii) city or county hospital,

(ix) school corporation, or

(x) board or commission of one (1) of the entities listed in clauses (i) through (ix), inclusive, of this subdivision;

(6) "state" means Indiana and its state agencies; and

(7) "state agency" means a board, commission, department, division, governmental subdivision including a soil and water conservation district, bureau, committee, authority, military body, or other instrumentality of the state, but does not include a political subdivision.

Chpater 29

INDIANA POLITICAL SUBDIVISION RISK MANAGEMENT COMMISSION.

Ind. Code Ann. 27-1-29-1 to -15

27-1-29-1 "Commission" defined

Sec. 1. As used in this chapter, "commission" refers to the Indiana political subdivision risk management commission established by this chapter.

27-1-29-2 "Fund" defined

Sec. 2. As used in this chapter, "fund" refers to the political subdivision risk management fund established by this chapter.

27-1-29-3 "Liability" defined

Sec. 3. As used in this chapter, "liability" means an obligation arising from a claim for the payment of money in an amount established under IC 34-4-16.5 or any other claim for which coverage is provided for members of the fund under rules adopted by the commission.

27-1-29-4 "Political subdivision" defined

Sec. 4. As used in this chapter, "political subdivision" has the meaning set forth in IC 34-4-16.5-2(5).

ARTICLE 12. APPROPRIATIONS MANAGEMENT

Chapter 1. The Budget Agency

4-12-1-1. Short title; purposes

Sec. 1. (a) This chapter shall be known and may be cited as the budget agency law.

(b) Its general purposes and policies may be perceived only from the entire chapter, but among them are four (4) of particular significance, namely:

(1) Vesting in the budget agency duties and functions and rights and powers which make the execution and administration of all appropriations made by law the exclusive prerogative and authority of that agency, and otherwise denying such prerogative and authority to the budget committee.

(2) Designating an officer of the executive department and four (4) members of the general assembly as members of the budget committee through which they mnay work between regular sessions of the general assembly and cooperatively propose and recommend to the general assembly

the appropriations which appear to be necessary to carry on state government in the succeeding budget period.

(3) Giving the members of the budget committee, who are members of the general assembly, the authority to engage in activities incidental and germane to their legislative powers, including investigations of appropriations made and to be made by law, before and after sessions of general assembly.

(4) Making the gathering of information, data, and expert opinion, with reference to the revenues of the state from current sources, and with reference to procuring additional revenues to meet appropriations which may be recommended, and making the evaluation of such data and opinion ar[illegible] of appropriations requested by agencies of the state, the concurrent prerogative and authority of the budget committee and the budget agency.

4-12-1-2 Definitions

Sec. 2. As used in this chapter unless a different meaning appears from the context:

. . . .

(d) The terms "agency of the state" or "agencies of the state" or "state agency" or "state agencies" mean and include every office, officer, board, commission, department, division, bureau, committee, fund, agency, and, without limitation by reason of any enumerationherein, every other instrumentality of the state of Indiana, now existing or which may be created hereafter; every hospital, every penal institution and every other institutional enterprise and activity of the state of Indiana, wherever located; the universities and colleges supported in whole or in part by state funds; the judicial department of the state of Indiana; and all non-governmental organizations receiving financial support or assistance from the state of Indiana; but shall not mean nor include cities, towns, townships, school cities, school towns, school townships, school districts, nor other municipal corporations or political subdivisions of the state.

. . . .

PURDUE UNIVERSITY

BUDGET, 1982-83 operating

Four campuses

Begining Balance	$ 3,426,230
Estimated income	
Student fees	59,227,044
State appropriations	132,454,132
Federal appropriations	11,587,930
Endowment income	380,000
Gifts, grants, and contracts	48,247,794
Sales and services	26,371,599
Organized activities	8,946,980
Student aid	14,679,901
Auxiliary enterprises	64,141,008
Total income	366,036,388
Total funds available	369,462,618

Source: Facts at Your Fingertips- A Resource Book for Those Who Speak and Write About Purdue (Purdue University 1982-83).

PURDUE UNIVERSITY -- OPERATING REVENUE 1983-84 [1]

Operating Revenue [2]	Unrestricted	Auxiliary Enterprises	Restricted	1984 Total	1983 Total
EDUCATION AND GENERAL					
Student Fees	76,415		1,902	78,317	73,127
State Appropriations	142,720		5,661	148,381	132,283
Federal Appropriations	50		13,179	13,229	12,505
Endowment Income	947		1,359	2,306	1,855
Grants and Contracts	10,336		51,340	61,676	59,197
Gifts	1,790		3,669	5,459	6,092
Sales and Services	4,064		11,818	15,882	16,257
Investment Income	5,832		131	5,963	7,301
TOTAL EDUCATION & GENERAL	242,154		89,059	331,213	308,617
Student Aid	107		14,021	14,128	11,859
Auxiliary Enterprises		59,485		59,485	57,365
TOTAL CURRENT REVENUES	242,261	59,485	103,080	404,826	377,841

(1) Source Purdue University Financial Report 1983-84 21.
(2) Amounts are in thousands of dollars.

GENERAL REVENUE OF PUBLIC SCHOOL SYSTEMS

SOURCE: U.S. Department of Commerce, Bureau of the Census, Finances of Public School Systems in 1983-84 4-5 & 8 (1985).

	STATE SUPPORT			% OF REVENUE		
St	Total (1) Revenue	Fed. Aid (2) Distributed by State	Other State Support	Fed. Aid (2) Distributed by State	Other State Aid	Total % of Aid From State
All	133,449,502	7,384,204	60,525,977	5.5	45.4	50.9
AL	1,376,562	169,255	810,003	12.3	58.8	71.1
AK	819,367	12,082	562,089	1.5	68.6	70.1
AZ	1,737,781	96,928	822,116	5.6	47.3	52.9
AK	968,478	100,285	485,506	10.4	50.1	60.5
CA	14,698,595	937,504	9,283,753	6.4	63.2	69.6
CO	1,920,586	68,655	757,964	3.6	39.5	43.1
CT	1,744,040	71,009	530,712	4.1	30.4	34.5
DE	332,273	22,615	222,809	6.8	67.1	73.9
DC	446,791					
FL	5,689,933	370,659	3,037,144	6.5	53.4	59.9
GA	2,625,270	129,875	1,410,063	4.9	53.7	58.6
HA	464,979	0	394,641		84.9	84.9
ID	468,224	29,307	282,111	6.3	60.3	66.6
IL	6,631,831	278,638	2,345,313	4.2	35.4	39.6
IN	2,217,541	120,540	1,391,194	4.4	51.2	55.6
IO	1,768,886	56,394	835,519	3.2	47.2	50.4
KS	1,488,932	31,972	606,469	2.1	40.7	42.8
KY	1,428,307	145,647	889,209	10.2	62.3	72.5
LO	2,141,290	193,058	1,106,169	9.0	51.7	60.7
ME	551,109	31,041	241,458	5.6	43.8	49.4
MD	2,483,010	120,613	779,713	4.9	31.4	36.3
MA	3,247,398	155,590	1,127,460	4.8	34.7	39.5
MI	6,215,459	287,106	1,552,786	4.6	25.0	29.6
MN	2,690,522	119,965	1,362,229	4.5	50.6	55.1
MS	1,110,103	160,411	619,959	14.5	55.8	70.3

MO	2,401,933	136,406	879,643	5.7	36.6	42.3
MT	580,571	14,688	208,792	2.5	36.0	38.5
NE	983,557	40,424	235,308	4.1	23.9	28.0
NV	447,579	14,879	282,949	3.3	63.2	66.5
NH	448,658	14,904	28,222	3.3	6.3	9.6
NJ	5,108,527	244,860	1,724,990	4.4	33.8	38.2
NM	879,862	58,415	660,844	6.6	75.1	81.7
NY	12,586,047	452,299	5,112,445	3.6	40.6	44.2
NC	2,899,686	239,652	1,793,282	8.3	61.8	70.1
ND	415,230	18,297	215,938	4.4	52.0	56.4
OH	5,882,847	272,545	2,505,638	4.6	42.6	47.2
OK	1,658,954	99,003	956,030	6.0	57.6	63.6
OR	2,005,676	82,716	653,702	4.1	32.6	36.7
PA	6,701,508	291,970	2,627,947	4.4	39.2	43.6
RI	493,369	23,352	174,214	4.7	35.3	40.0
SC	1,360,633	142,094	610,388	10.4	44.9	55.3
SD	368,844	21,351	101,631	5.8	27.6	33.4
TN	1,646,925	169,248	598,328	10.3	36.3	46.6
TX	9,593,101	825,557	4,086,870	8.6	42.6	51.2
UT	916,799	43,232	486,934	4.7	53.1	57.8
VT	273,202	9,350	78,361	3.4	28.7	32.1
VA	2,922,783	162,513	1,213,440	5.6	41.5	47.1
WA	2,449,080	124,647	1,757,263	5.1	71.8	76.9
WV	972,251	77,363	579,826	8.0	59.6	67.6
WI	3,023	102,804	1,239,043	3.4	41.0	44.4
WY	660,865	12,486	257,560	1.9	39.0	40.9

(1) All amounts are in thousands of dollars.
(2) The amount does not include aids directly given by Federal Gonment to a public school system.

* Quoted from the appendix to the amicus brief of Indiana Civil Liberties Union, filed in the Seventh Circuit.

RVENUE SOURCES OF STATE UNIVESITIES

SOURCE: National Center for Edu. Statistics, Financial Statistics of Inst. of Higher Learning, Fiscal Year 1978 (1980).

St.	Total[1] Revenue	State[2] Support	Federal[3] Support	Other[4]	State aid As % of Revenue	5 Cite
All	13,234,510	5,405,602	344,356	7,484,552	40.84	14
CT	113,148	61,601	3,172	48,376	54.44	18
ME	55,699	14,738	3,505	37,456	26.46	20
MA	141,398	76,092	3,966	61,340	53.81	22
NH	74,515	20,876	212	53.427	28.02	24
RI	73,260	32,406	0	40,854	44.23	26
VT	73,404	14,442	2,676	56,286	19.67	28
DE	98,453	27,357	2,095	69,001	27.79	32
MD	168,021	70,486	2,116	95,419	41.95	36
NJ	157,009	82,856	2,603	71,550	52.77	38
NY	215,170	126,021	0	89,149	58.57	40
PA	657,584	211,565	11,777	434,242	32.17	42
IL	494,141	244,701	11,320	238,120	49.52	46
IN	530,247	209,119	7,687[6]	313,441	39.44	48
MI	935,376	336,123	609	588,544	35.93	50
OH	966,332	335,875	27,700[6]	602,757	34.76	52
WI	374,489	139,281	3,257	231,951	37.19	54
IA	432,325	169,246	6,168	256,911	39.15	58
KS	233,702	111,456	5,391[6]	116,855	47.69	60
MN	456,973	161,625	8,851	286,497	35.37	62
MO	200,481	87,257	8,055	105,169	43.52	64
NE	126,074	56,238	3,835	66,001	44.61	66
ND	98,146	38,384	4,157	55,605	39.11	68
SD	64,346	27,542	3,947	32,857	42.80	70
AL	197,238	94,113	12,868[6]	90,257	47.72	74
AK	83,857	41,762	7,568	34,527	49.80	76
FL	406,416	199,640	4,493	202,283	49.12	78

GA	164,487	85,808	9,692[6]	68,987	52.17	80
KY	294,922	123,542	12,544[6]	158,836	41.89	82
LA	108,499	46,822	512	61,165	43.15	84
MS	136,750	54,305	11,558[6]	70,887	39.71	86
NC	358,504	151,031	13,412	194,061	42.13	88
SC	182,211	99,993	7,393	74,825	54.88	90
TN	157,771	63,763	9,284[6]	84,724	40.41	92
VA	495,806	161,396	14,424	319,986	32.55	94
WV	68,727	39,492	5,348	23,887	57.46	96
AZ	343,398	155,639	2,986	184,773	45.32	100
NM	160,838	65,412	4,068	91,358	40.67	102
OK	205,687	71,789	6,384	127,514	34.90	104
TX	791,995	356,864	56,038	379,093	45.06	106
CO	243,149	66,391	7,984	168,774	27.30	110
ID	54,400	30,521	3,015	20,864	56.10	112
MT	81,685	34,769	3,142	43,774	42.56	114
UT	241,307	83,106	2,635	155,566	34.44	116
WY	78,255	36,956	6,788	34,511	47.23	118
AL	67,775	31,667	80	36,028	46.72	122
CA	755,857	318,982	4,347	432,528	42.20	124
HA	130,872	72,098	1,526	57,248	55.09	126
NE	41,040	21,888	109	19,043	53.33	128
OR	186,498	69,603	6,500[6]	40,792	37.32	130
WA	452,272	170,558	5,557	276,157	37.71	132

(1) Amounts given in thousands.
(2) Amounts given in thousands.
(3) Amounts given in thousands.
(4) Other includes all self-generated funds: tuitional fees, gifts, endowment income, grants, contracts, sales and services, and income from auxiliary enterprises. Amounts are given in thousands
(5) Applicable page number of the source.
(6) Amount given includes contributions received from a local governments.

* Quoted from the appendix to the amicus brief of Indiana Civil Liberties Union, filed in the Seventh Circuit.

STATE SUPPORT OF SELECTED COUNTIES

Source: U.S. Dep't of Commerce, Bureau of the Census, County Government Finances in 1983-84 (1985).

State & County	Total[1] Revenue	State[2] Support	State Aid As % of Revenue	3 Cite
Indiana				
Allen	45,056	12,418	27.56	18
Delaware	21,000	8,464	40.30	18
Elkhart	23,669	10,236	30.40	18
Lake	120,212	56,630	47.11	19
LaPorte	20,149	7,904	39.23	19
Madison	25,711	12,098	47.05	19
Monroe	12,296	2,952	24.01	19
Porter	60,886	6,397	10.51	19
St. Joseph	45,869	17,242	37.59	19
Tippecanoe	15,344	5,609	36.59	19
Vanderburgh	29,613	12,249	41.36	19
Illinois				
Champaign	22,249	3,432	15.43	16
Lake	74,730	11,181	14.96	17
McLean	16,275	4,627	28.43	17
Wisconsin				
Dane	87,024	37,240	42.79	53
Marathon	48,447	15,264	31.51	53
Racine	53,312	24,859	46.63	54

(1) Amounts given in thousands.
(2) Amounts given in thousands.
(3) Applicable page number in the source.

* Quoted from the appendix to the amicus brief of Indiana Civil Liberties Union filed in the Seventh Circuit.